SHER TREMONTE LLP

September 21, 2016

**VIA ECF**

The Honorable P. Kevin Castel
United States District Judge
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

**Re: *United States v. Gary Hirst*, 15 Cr. 643(PKC)**

Dear Judge Castel:

We write to respectfully request the following two instructions be added to the Court's proposed jury charge. We incorporate by reference the objections and requests previously filed on June 28 and September 19, 2016.

Conscious Avoidance

We continue to object to any "conscious avoidance" instruction in this case, as the evidence introduced during the course of this trial does not support such an instruction. If the Court determines that a conscious avoidance instruction is appropriate, we respectfully request that the Court provide the jury with the following charge:

> I told you earlier that Mr. Hirst, in various respects, must have acted knowingly in order to be convicted. This is true with respect to all four Counts of the Indictment. In determining whether Mr. Hirst acted knowingly with respect to the substantive crimes or the objectives of the conspiracy, you may consider whether Mr. Hirst deliberately closed his eyes to what otherwise would have been obvious to him, and acted with deliberate disregard of the facts. However, I caution you that acts done knowingly must be a product of a person's conscious intention. They cannot be the result of carelessness, negligence, or foolishness. To find knowledge on this basis, it is not sufficient that a person may not have tried hard enough to learn the truth. But a person may not willfully and intentionally remain ignorant of a fact that is material and important to his conduct in order to escape the consequences of criminal law.
>
> An argument by the Government of conscious avoidance is not a substitute for proof of knowledge; it is simply another factor that you, the jury, may

80 Broad Street, Suite 1301 | New York, New York 10004
www.shertremonte.com | Tel: 212-202-2600 | Fax: 212-202-4156

> consider in deciding what Mr. Hirst knew. Thus, if you find beyond a reasonable doubt that Mr. Hirst was aware that there was a high probability that a material fact was so, but that he deliberately and consciously avoided confirming this fact, then you may find that Mr. Hirst had knowledge of that material fact, unless you find that Mr. Hirst actually believed that it did not exist. If you find that Mr. Hirst actually believed that a particular material fact did not exist, then you may not conclude that he acted knowingly, and you must acquit him.
>
> With respect to the conspiracy counts, you must also keep in mind that there is an important difference between intentionally participating in the conspiracy, on the one hand, and knowing the specific object or objects of the conspiracy, on the other. You may consider conscious avoidance in deciding whether Mr. Hirst knew the objective or objectives of a conspiracy; that is, whether he reasonably believed that there was a high probability that a goal of the conspiracy was to commit the crimes charged as objects of that conspiracy and deliberately avoided confirming that fact but participated in the conspiracy anyway. But conscious avoidance cannot be used as a substitute for finding that Mr. Hirst intentionally joined the conspiracy in first place. It is logically impossible for a person to intend and agree to join a conspiracy if he does not actually know it exists, and that is the distinction I am drawing.
>
> In sum, if you find that Mr. Hirst believed there was a high probability that a material fact was so and that Mr. Hirst deliberately and consciously avoided learning the truth of that material fact, you may find that the defendant acted knowingly with respect to that fact. However, if you find that the defendant actually believed the fact was not so, then you may not find that he acted knowingly with respect to that fact. You must judge from all the circumstances and all the proof whether the Government did or did not satisfy its burden of proof beyond a reasonable doubt.

Adapted from Jury Instructions, *United States v. Bonventre*, 10-cr-228 (LTS) (S.D.N.Y. Mar. 17, 2014), ECF No. 773 and Joint Requests to Charge, *United States v. Stewart*, No. 15-cr-287 (LTS) (S.D.N.Y. July 1, 2016), ECF No. 109.

Defense Theory of the Case

"A criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in the proof." *United States v. Dove,* 916 F.2d 41, 47 (2d Cir. 1990); *see also United States v. GAF Corp.,* 928 F.2d 1253, 1262 (2d Cir. 1991) ("This Court has repeatedly recognized a criminal defendant's right to a jury charge which reflects the defense theory."). We respectfully request that the Court give the following instruction on Mr. Hirst's theory of the case:

Mr. Hirst has pled not guilty to all counts of the Indictment. Mr. Hirst's defense is that he held an honest belief that his actions were proper and not in furtherance of any illegal venture. If you believe that the Government has not proven beyond a reasonable doubt that Mr. Hirst acted with criminal intent and had knowledge of the conspiracies and willfully participated in them, then you must acquit him.

You must remember that, by presenting a defense and pointing out evidence to you, Mr. Hirst has not assumed any burden of proof. The burden remains on the Government to prove each and every element of each of the crimes charged beyond a reasonable doubt. In fact, Mr. Hirst did not have to present any defense. Because Mr. Hirst has presented a defense, you can consider that defense in deciding if the Government has proven its case beyond a reasonable doubt.

We appreciate the Court's consideration.

Respectfully submitted,

/s/ *Michael Tremonte*

Michael Tremonte
Justine A. Harris
Noam Biale
SHER TREMONTE LLP
80 Broad Street, 13th Floor
New York, NY 10004
Tel: (212) 202-2600
Fax: (212) 202-4156
Email: mtremonte@shertremonte.com

cc: AUSA Brian Blais (via ECF)
AUSA Rebecca Mermelstein (via ECF)
AUSA Aimee Hector (via ECF)